Supreme Court, U.S.
FILED

05-902 JAN 16 2006

No. 05 OFFICE OF THE CLERK

In the Supreme Court of the United States

DONALD L. BRAMLAGE, JR. AND
DONNA L. BRAMLAGE,
Petitioners,

v.

WELLS FARGO HOME MORTGAGE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD L. BRAMLAGE, JR.
Counsel of Record

30300 NORTHWESTERN HIGHWAY
SUITE 111
FARMINGTON HILLS, MI 48334
(248) 932-3500

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals erred in considering and ruling that Petitioners' FRCP 56 (f) affidavit was insufficient as the District Court never considered or ruled on the sufficiency of the affidavit.

2. Whether the Sixth Circuit Court of Appeals erred in affirming the District Court's ruling to the extent that the Petitioners were not entitled to any discovery.

3. Whether the Sixth Circuit Court of Appeals erred in affirming the District Court's ruling that there was no disputed issue of fact.

PARTIES TO THE PROCEEDINGS

Petitioners are Donald L. Bramlage, Jr. and Donna L. Bramlage.

Respondent is Wells Fargo Home Mortgage, Inc.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement 2

Reasons for Granting of the Petition 4

A. The Decision Of The Sixth Circuit As To The Insufficiency Of Petitioners' FRCP 56 (f) Affidavit Undermines This Court's Decision in *Wisconsin v Mitchell* 4

B. The Court Of Appeals Decision, To The Extent That It Affirms The District Court's Denial Of Discovery To the Petitioners, Is Contrary To This Court's Decision in *Anderson v Liberty Lobby, Inc.* And *Celotex Corp v Catrett* 4

C. The Sixth Circuit Ruling Affirming The District Court's Finding That There Was No Genuine Issue of Material Fact Was Erroneous 5

Conclusion 6

Appendix

Appendix A – 10-20-2005 – United States Court of Appeals For the Sixth Circuit Order Denying Rehearing *En Banc* 1a

Appendix B – 8-8-2005 – United States Court of Appeals For the Sixth Circuit Opinion 3a

Appendix C – 3-17-2004 – United States District Court – Eastern District of Michigan Southern Division Order of the Court Granting Defendant's Motion For Summary Judgment, etc. 15a

TABLE OF AUTHORITIES

Cases

Anderson v Liberty Lobby, Inc.,
477 U.S. 242 (1986) 2, 4, 5

Celotex Corp v Catrett,
477 U.S. 317 (1986) 2, 4

Lujan v National Wildlife Foundation,
497 U.S. 871 (1990) 4

Wisconsin v Mitchell,
508 U.S. 476 (1993) 4

PETITION FOR A WRIT OF CERTIORARI

Petitioners Donald L. Bramlage, Jr. and Donna L. Bramlage respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix at App. 3a. The order of the District Court granting the Defendant's motion for summary judgment is unreported and is reproduced at Appendix 14a.

JURISDICTION

The court of appeals judgment was entered on August 3, 2005. A timely petition for rehearing was denied on October 20, 2005. Appendix at App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT

Petitioners seek review of the ruling of the Sixth Circuit Court of Appeals which affirmed the ruling of the District Court which denied them discovery before dismissing their cause of action, and, further, considered and ruled on an issue not before the District Court. Additionally, the District Court erroneously concluded that there were no disputed issues of fact.

Petitioners seek such review because the ruling of the Court of Appeals is in conflict with the rulings of this Court in *Anderson v Liberty Lobby*, Inc., 477 U.S. 242, (1986) and *Celotex Corp v Catrett*, 477 U.S. 317, (1986). The ruling of the Court of Appeals is also in conflict with the ruling of this Court in *Wisconsin v Mitchell*, 508 U.S. 476, (1993).

The petition arises out of a Michigan foreclosure action concerning the Plaintiffs' residence located in Grosse Pointe Park, Michigan. The foreclosure sale was scheduled for August 22, 2002, but the Petitioner Donald L. Bramlage, Jr. filed for Chapter 7 bankruptcy, which resulted in an automatic stay of the sale. When the stay was lifted, the Petitioners' residence was sold on November 6, 2002, with no actual notice to the Plaintiffs.

On September 16, 2003, the Petitioners filed this case in state court, claiming that the Defendant did not comply with Michigan law in adjourning the foreclosure sale. The case was removed to the District Court due to diversity of citizenship.

Upon removal, and with no discovery allowed, the District Court dismissed the matter based upon the Defendant's motion, which relied on certain unauthenticated,

preprinted and unsigned forms purportedly evidencing the alleged weekly adjournments, which if made properly, would have been in compliance with Michigan law. On the other hand, the Petitioners introduced a properly executed, witnessed and notarized deed which stated clearly that the foreclosure "..sale (was) adjourned from August 21, 2002, to November 6, 2002" which, under Michigan law, would have required publication. The issue, clearly, was whether there were weekly adjournments (not requiring publication) or whether there was one adjournment from August 21, 2002, to November 6, 2002, which would have required publication.

The Court ruled that there was no factual dispute to be decided and that the statement in the deed was not inconsistent with the Respondent's position that there were weekly adjournments.

Petitioners appealed this decision to the Sixth Circuit Court of Appeals. There, the Sixth Circuit affirmed the ruling of the District Court and further ruled that the Petitioner's FRCP 56 (f) affidavit was deficient. (The District Court never ruled on Petitioner's FRCP 56 (f) affidavit, nor was is ever an issue at the District Court level). The Sixth Circuit subsequently denied a petition for rehearing.

REASONS FOR GRANTING OF THE PETITION

A. THE DECISION OF THE SIXTH CIRCUIT AS TO THE INSUFFICIENCY OF PETITIONERS' FRCP 56(f) AFFIDAVIT UNDERMINES THIS COURT'S DECISION IN *WISCONSIN* v *MITCHELL*

There is nothing in the record below to indicate that the sufficiency of Petitioner's FRCP 56(f) affidavit was ever briefed, argued, or ruled upon at the District Court level or the Sixth Circuit level. *Wisconsin v Mitchell*, 508 U.S. 476, (1993) holds that an appellate court may not consider an issue not raised first in the trial court or relied on by the trial court.

The Petitioners were thereby deprived of an opportunity to brief and argue the sufficiency of their FRCP 56 (f) affidavit in either court.

B. THE COURT OF APPEALS DECISION, TO THE EXTENT THAT IT AFFIRMS THE DISTRICT COURT'S DENIAL OF DISCOVERY TO THE PETITIONERS, IS CONTRARY TO THIS COURT'S DECISION IN *ANDERSON v LIBERTY LOBBY, INC.* AND *CELOTEX CORP v CATRETT*

Anderson v Liberty Lobby, Inc., 477 U.S. 242, (1986) and *Celotex Corp v Catrett*, 477 U.S. 317, (1986) each hold that a plaintiff must receive a "full opportunity" or "adequate time" to conduct discovery to be able to defend a motion for summary judgment. See also *Lujan v National Wildlife Foundation*, 497 U.S. 871, (1990). The Sixth Circuit made a fundamental error in concluding that the Petitioners had been allowed some discovery, which is evidenced by the fact that their opinion, Appx.3a refers continually to the trial court's "denial of *further* discovery".

This Court, as indicated in the above cases, has advocated a clear policy of allowing a party to conduct discovery before considering a dismissal of that party's claim. Otherwise a defendant, who controlled all the information concerning the matter at issue, could, upon receiving a complaint, obtain a dismissal without disclosing relevant information in its possession which could have been instrumental in defending such a motion.

The Petitioners should have been allowed discovery prior to deciding the Respondent's Motion To Dismiss.

C. THE SIXTH CIRCUIT RULING AFFIRMING THE DISTRICT COURT'S FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WAS ERRONEOUS.

Anderson, supra, indicates that the "..weighing of the evidence, and the drawing of legitimate inferences from the facts.." are not functions of a judge in a summary judgment hearing. Further *Anderson* goes on to say that "(t)he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor".

In this case, the District Court should have, for purposes of the Respondent's motion, believed that the statement in the deed was true (that the foreclosure sale was adjourned from August 21, 2002 to November 6, 2002) and the Petitioners should have been allowed an inference from the plain wording of the deed that there was only one (1) adjournment. This would have implicated a requirement that notice of the adjournment should have been published, which didn't occur. The District Court clearly weighed the evidence and determined that the statement from the deed and the weekly

adjournment forms were consistent, which is the province of the finder of fact.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
Donald L. Bramlage, Jr.
Counsel for Petitioners
Donald L. Bramlage, Jr., P.C.
30300 Northwestern Hwy., Ste. 111
Farmington Hills, MI 48334